

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BEVERLY J. TULL

Claimant

VS.

**ATCHISON LEATHER PRODUCTS and
BERGER COMPANY, INC.**

Respondents

AND

**FIREMAN'S FUND INSURANCE COMPANY,
CINCINNATI INSURANCE COMPANY,
ST. PAUL FIRE & MARINE INSURANCE CO.,
COMMERCE & INDUSTRY INSURANCE CO.,
BUSINESS INS. CO./SUPERIOR NATIONAL
INS. CO./RISK ENTERPRISE MANAGEMENT**

Insurance Carriers

Docket No. 258,286

ORDER

Respondent Atchison Leather Products and its insurance carrier Commerce and Industry Insurance Company appeal the September 16, 2004 Order of Administrative Law Judge Bryce D. Benedict. The Board placed this matter on its Summary Docket and deemed it submitted without oral argument. After hearing evidence and arguments, the Administrative Law Judge (ALJ) found:

The objection of Commerce and Industry to the filing of the amended Application is denied.

The transcripts and IME in the Court file will be part of the record. Any party may take the deposition of any witness previously deposed, to include the IME physician.

The Claimant will make herself available for cross-examination by counsel for Commerce and Industry, either [at] the Regular Hearing or via an

evidentiary deposition. Said cross examination shall not be limited to counsel for Commerce and Industry.¹

APPEARANCES

Claimant appeared by her attorney, Dennis L. Horner of Kansas City, Kansas. Respondent Atchison and its insurance carrier Fireman's Fund Insurance Company appeared by their attorney, Steven J. Quinn of Kansas City, Missouri. Respondent Atchison and its insurance carrier Superior National Insurance Company (administered by Risk Enterprise Management) appeared by their attorney, John R. Emerson of Kansas City, Kansas. Respondent Atchison and its insurance carrier St. Paul Fire and Marine Insurance Company appeared by their attorney, Katharine M. Collins of Overland Park, Kansas. Respondent Atchison and its insurance carrier Commerce and Industry Insurance Company appeared by their attorney, William G. Belden of Merriam, Kansas. Respondent Berger Company, Inc., and its insurance carrier Cincinnati Insurance Company appeared by their attorney, D'Ambra M. Howard of Shawnee Mission, Kansas.

RECORD AND STIPULATIONS

The Board has considered the entire record, including the regular hearing transcript of February 26, 2004, with exhibits, and the transcript of the hearing on motion of September 14, 2004, including all exhibits, as well as the record maintained in the office of the Workers Compensation Director in this matter, including all documents and pleadings contained therein.

ISSUES

Respondent Atchison Leather Products (hereinafter Atchison) and its insurance carrier Commerce and Industry Insurance Company argue the ALJ exceeded his jurisdiction in granting claimant's motions to suspend terminal dates and in allowing claimant to file an amended application for hearing. Respondent Atchison requests the ALJ's Order be vacated for "violating the basic due process guarantees of notice and opportunity to present evidence."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented, the Appeals Board (Board) finds the appeal of respondent Atchison and its insurance carrier Commerce and Industry Insurance Company should be dismissed.

¹ Order (Sept. 16, 2004).

To describe this record as somewhat confusing would be an understatement. This matter has been ongoing since claimant's original injury on September 8, 1999, while working for Atchison. The original E-1 was filed in this matter on August 16, 2000, displaying a date of accident of September 8, 1999, against Atchison and its insurance carriers Fireman's Fund Insurance Company and Superior National Insurance Company. This E-1, originally filed by a pro se claimant, was amended on January 17, 2001, when claimant hired counsel. The amended E-1 contained the same date of accident, but added St. Paul Fire and Marine Insurance Company as an insurance company. A pre-hearing settlement conference was scheduled for October 1, 2002, at which time the ALJ issued an Order for an independent medical examination. A second pre-hearing settlement conference was set for February 25, 2003, and the regular hearing was originally set for August 14, 2003. In the meantime, on April 23, 2002, claimant terminated her employment with Atchison and the next day, on April 24, 2002, began her employment with Berger Company, Inc.

On July 10, 2003, claimant filed a 7-day demand for additional temporary total disability compensation, indicating that claimant was not permanently disabled, but her condition was still temporary. A follow-up amended E-1 was filed on July 9, 2003, claiming a date of accident of September 8, 1999, against Atchison, with a series of injuries claimed against Berger Company, Inc., through claimant's last day worked. Additionally, Risk Enterprise Management and Cincinnati Insurance Company were added as insurance carriers. An additional pre-hearing settlement conference was set for November 18, 2003, with a regular hearing again set for February 26, 2004. The regular hearing, which did occur on February 26, 2004, resulted in a letter being issued by the ALJ on February 27, 2004, advising the parties, including all insurance companies with the exception of Commerce and Industry Insurance Company, that an additional date of accident was being alleged by claimant against respondent Atchison, showing a date of accident through claimant's last day worked, which would be April 23, 2002. It was noted by the ALJ that the insurance carrier having coverage during the period had not been joined as a party and was not included in the litigation. Additionally, there was some concern about whether claimant had alleged a series of accidents against Atchison or whether the series of accidents allegation was only against Berger Company, Inc.

On March 9, 2004, claimant filed her Motion For An Order To Suspend Terminal Dates And Permit An Amended Application. On March 26, 2004, attorney William G. Belden entered his appearance for respondent Atchison and Commerce and Industry Insurance Company, its insurance carrier on the risk as of claimant's last day worked with Atchison. On April 5, 2004, attorney Belden provided a letter objecting to the extension of terminal dates and the requested amended application. Also on April 5, 2004, a telephone conference was held between the ALJ and various attorneys, of which Mr. Belden was not one, although there was an indication in the record that he had been intended to be included, but for some reason was overlooked. From this telephone conference, the ALJ issued a letter of April 5, 2004, advising all counsel, including Mr. Belden, of the problem

with the terminal dates. By that letter, the ALJ removed all terminal dates in order to give the parties time to “work something out.” Obviously, from the record, the parties were unsuccessful in working anything out.

On April 6, 2004, an additional amended E-1 was filed, alleging a date of accident of September 8, 1999, through April 23, 2002, against Atchison, and beginning April 24, 2002, to the present against Berger Company, Inc. A pre-hearing settlement conference was again noticed up for September 14, 2004, with a notice of hearing on the Order to suspend terminal dates and permit the amended E-1 also being set for September 14, 2004. On September 16, 2004, the ALJ issued the above quoted Order.

Appeals from administrative law judges’ decisions to the Board are statutorily limited. The Board has the right to review all final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments made thereto by an administrative law judge.² K.S.A. 44-534a, which deals with appeals from preliminary hearing orders, limits the appeals to findings with regard to whether the employee suffered an accidental injury, whether the injury arose out of and in the course of employment, whether notice is given or claim timely made, or whether certain defenses apply. Those issues are considered jurisdictional under K.S.A. 44-534a and subject to review by the Board. Those issues are not present in this matter, and, therefore, this matter would not be appealable under K.S.A. 44-534a.

However, K.S.A. 2003 Supp. 44-551 goes on to state that an appeal is also allowed if it is alleged that an administrative law judge exceeded the administrative law judge’s jurisdiction in granting or denying the relief requested from a preliminary hearing. Again, it is noted this is not a preliminary hearing, but is instead a hearing on claimant’s motion to extend terminal dates and file an amended E-1 in this matter. An administrative law judge’s decision to extend terminal dates is interlocutory in nature and made during the litigation of a workers compensation claim. It is neither a final order that can be reviewed pursuant to K.S.A. 2003 Supp. 44-551, nor an order entered pursuant to preliminary hearing statute K.S.A. 44-534a. Consequently, the Order issued by the ALJ on September 16, 2004, is not reviewable by the Board.

K.S.A. 1999 Supp. 44-523(a) states that neither the Director, the administrative law judge nor the Board are bound by the technical rules of procedure, but “shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.” K.S.A.

² K.S.A. 2003 Supp. 44-551(b)(1).

1999 Supp. 44-523 goes on to state that extensions of terminal dates, once set, may be granted “on application for good cause shown.”³

In this instance, respondent Atchison and its insurance carrier Commerce and Industry Insurance Company argue a denial of due process by the ALJ for suspending terminal dates and allowing claimant to file an amended application. However, it is noted that respondent Atchison has been a party to this action since it began. Respondent Atchison has been represented by counsel at every phase of this dispute and has had the opportunity to appear at every hearing and at every deposition, having been properly notified. The conflict arises with the appearance of Commerce and Industry Insurance Company for the date of accident including claimant’s last date of employment with Atchison.

Every workers compensation policy in Kansas must contain a clause that provides between “any employer and the insurer, notice to and knowledge of the occurrence of injury or death on the part of the insured shall be notice and knowledge on the part of the insurer; and jurisdiction of the insured shall be jurisdiction of the insurer and the insurer shall be bound by every agreement, adjudgment, award, or judgment rendered against the insured.”⁴ Respondent Atchison, through its insurance carrier Commerce and Industry Insurance Company, argue that it has been denied basic due process guarantees of notice and the opportunity to present evidence. However, it is the employer that must be given proper notice and an opportunity to be heard and to defend against a claim. The insurance company has no separate right of procedural due process flowing from the provisions of the Workers Compensation Act.⁵

Throughout this proceeding, the interests of respondent Atchison have been vigorously defended, with no credible claim that the due process rights of the employer were, in any way, violated. The Board, therefore, finds the decision by the ALJ to extend the terminal dates in this matter and to expand the terminal dates to allow the parties to take the deposition of any and all witnesses, including the claimant, was well within the jurisdiction of the ALJ, and respondent’s appeal from that Order should be, and is hereby, dismissed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the respondent’s appeal from the Order of Administrative Law Judge Bryce D. Benedict dated September 16, 2004, should be, and is hereby, dismissed.

³ K.S.A. 1999 Supp. 44-523(b)(3).

⁴ K.S.A. 1999 Supp. 40-2212.

⁵ *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000), citing *Landes v. Smith*, 189 Kan. 229, 368 P.2d 302 (1962).

IT IS SO ORDERED.

Dated this ____ day of January, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Dennis L. Horner, Attorney for Claimant
William G. Belden, Attorney for Respondent Atchison and its Insurance Carrier
Commerce and Industry Insurance Company
John R. Emerson, Attorney for Respondent Atchison and its Insurance Carrier
Superior National Insurance Company/Risk Enterprise Management
Steven J. Quinn, Attorney for Respondent Atchison and its Insurance Carrier
Fireman's Fund Insurance Company
Katharine M. Collins, Attorney for Respondent Atchison and its Insurance Carrier
St. Paul Fire and Marine Insurance Company
D'Ambra M. Howard, Attorney for Respondent Berger Company, Inc., and its
Insurance Carrier Cincinnati Insurance Company
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director